MICHIGAN LAW REVIEW

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NOTE AND COMMENT

REPEALS BY IMPLICATION—PROHIBITION IN MICHIGAN.—At the November election of 1916 the people of the state of Michigan ratified the following amendment to the constitution of that state: "The manufacture, sale, giving away, bartering or furnishing of any vinous, malt, brewed, fermented, spirituous or intoxicating liquors, except for medicinal, mechanical, chemical, scientific or sacramental purposes shall be after April thirty, nineteen hundred eighteen, prohibited in the State forever. The Legislature shall by law provide regulations for the sale of such liquors for medicinal, mechanical, chemical, scientific and sacramental purposes."

As is known by every resident of Michigan and as may be surmised by parties outside, the adoption of the amendment was preceded by a great deal of discussion, not always free from acrimony. And the debates did not cease with the election, for at the forthcoming session of the legislature the necessary legislation to carry the amendment into effect was to be considered. There were "bone dry" advocates, there were supporters of a liberal policy, and there were proponents of various intermediate schemes. Every intelligent follower of public events in Michigan knew full well that for a long time it was questionable as to what plan would be adopted by the legislature, and more than one bill was introduced and considered.

On May 2, 1917, there received the approval of the Governor Act No. 161 called commonly the Damon Act, which provided in Sec. 1, that "It shall be unlawful for any person to bring or carry into or receive or possess within this State any vinous, malt, brewed, fermented, spirituous or intoxicating li-

quors except for medicinal, mechanical, chemical, scientific or sacramental purposes." Section 2 provided that "All laws of this State pertaining to search for, seizure of, and complaints, warrants and proceedings relative to such liquors shall be applicable under this Act," etc. By Section 4 it was provided that "Any person who, himself or by his clerk, agent or employee, shall violate * * * this act, shall be deemed guilty of a misdemeanor", etc. Section 6 of the Act declared that "The provisions of this act shall take effect and be in force on and after May one, nineteen hundred eighteen."

This act might properly be called a "bone-dry" act, and obviously its passage by the legislature was a victory for the advocates of that sort of measure.

At the time this act was passed there was pending in the legislature another bill which was enacted into law, the approval of the Governor bearing date of May 10, 1917. This Act, No. 338, known as the Wiley Act, was entitled "An Act to prohibit the manufacture, sale, keeping for sale, giving away, bartering or furnishing any vinous, * * * liquors", etc. By Section 2 of this act it is made "unlawful for any person, directly or indirectly, himself or by his clerk, agent or employe, to manufacture, sell or keep for sale, give away, barter, furnish or otherwise dispose of any vinous * * * liquors." The Wiley Act consists of sixty-one sections obviously designed effectively to prohibit the manufacture sale, etc., of intoxicating liquors, except for medicinal, etc., purposes; to regulate the manufacture, sale and possession thereof for such excepted purposes; to provide for enforcement and penalties for violations; to prohibit certain advertising; to prescribe the duties of officers and carriers; to prescribe rights of action; and to appeal all acts in conflict therewith. The sixty-first section provided that the "provisions of this act shall take effect and be in force on and after May first, nineteen hundred eighteen."

It should be observed that this latter act makes it unlawful *to manufacture, sell or keep for sale, give away, barter, furnish or otherwise dispose of* intoxicating liquors, while the Damon Act covered the *bringing and carrying into the state, the receiving and possessing of* intoxicating liquors; that the two acts were passed by the same legislature and approved less than ten days apart; and that both were to be effective according to their terms on May 1, 1918.

On August 1, 1918, officers, without a warrant, entered the premises of one Marxhausen, searched for and seized a large quantity of intoxicating liquors, some in the dwelling house. The liquors so seized were conveyed to the county building, and shortly thereafter a complaint was filed charging Marxhausen with a violation of the so-called Damon Act, above referred to. The Supreme Court, upholding the trial court, held (1) that the search and seizure was unlawful and that the beverages should be returned to their owner and (2) that the Wiley Act had superseded and repealed by implication the Damon Act, so the information was rightly quashed. *The People of the State of Michigan* v. *Marxhausen,* decided February, 1919.

The court was convinced that the legislative intent was that the Wiley Act should cover the entire field of liquor legislation. To the argument that that act was obviously designed to prohibit the merchandizing of liquor while the Damon Act applied to personal use, the court replied by pointing out that

the latter was not limited to prohibition of personal use, for Section 4 of that act provides: "Any person who, himself or by his *clerk, agent,* or *employe* shall violate any of the provisions of this act," etc. "Clearly", said the court, "if the legislature by the Damon Act solely designed to prohibit and prevent the personal use of intoxicating liquors there would be no occasion to use the words *Clerk, Agent,* or *Employee.* The use of these words in the fourth section of the act, the penal section, eliminates the argument that the Damon Act was designed to cover and apply only to a field not contemplated by the Wiley Act." In this conclusion the court failed to attend to the words of the Damon Act. Section 1, as pointed out above, made it unlawful "to *bring* or *carry into* or *receive* or possess within this State" any liquors. It must be perfectly obvious that at least the "bringing" and "carrying" into the state might be by "agent" or "employee" or even by a "clerk." The use of the last word perhaps affords some basis for a view that merchandizing was covered by the Damon Act. It is, however, a very slender foundation for a conclusion that the two acts covered the same field.

The court quotes from and cites a number of cases establishing the undoubtedly sound rule as expressed in *Shannon* v. *People,* 5 Mich. 85, "That where a subsequent statute covers the whole ground occupied by an earlier statute, it repeals by implication the former statute, though there be no repugnance." This rule is applicable, however, only when the later statute *"covers the whole ground".* That the Wiley Act did not bear such relation to the Damon Act would seem clear upon the most casual reading. Further and more careful reading and reflection serves only to strengthen such conclusion. That the seven judges present (OSTRANDER, J., was absent)—the report of the case states that it was "before the full bench"—should have agreed in the conclusion is remarkable.

The part of the opinion dealing with the question of search and seizure complained of is an able and thorough consideration of the question of unreasonable searches and seizures. R. W. A.

THE "SOURCE OF LAW" IN THE PANAMA CANAL ZONE.—A case just decided in the Supreme Court of the United States, coming to that court from the Canal Zone, shows the great difficulties under which our courts labor when they are called on to interpret and administer the law in our extra-continental possessions. The courts have apparently had the most difficulty in amalgamating the Roman law and the common law in cases involving questions of delictual liability. In the case of *Fernandez* v. *Perez* (1906), 202 U. S. 80, the procedural question was presented as to the validity of an action on the case for the wrongful levy of an attachment brought in the United States District Court for the District of Porto Rico. A decision of the point involved a discussion of the relation of torts to crimes in the Spanish law. Such a discussion was presented in 6 MICH. L. REV. 136, 149, (1907).

In *Panama Railroad Company, Plaintiff in Error* v. *Theodore Bosse,* U. S. Sup. Ct. March 3, 1919, the plaintiff in the lower court had been injured by a motor omnibus, negligently driven by a chauffeur of the Panama Railroad Company at an excessive rate of speed through a crowded street in the